Filed 3/5/19 P. v. Kurbssoian CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. SARKIS KURBSSOIAN, Defendant and Appellant.	2d Crim. No. B289842 (Super. Ct. No. 2015013240) (Ventura County)

Sarkis Kurbssoian appeals an order denying his postjudgment motion to terminate his mandatory supervision and strike his prior three-year sentence enhancement required by former Health and Safety Code section 11370.2.[1] In 2015 he was convicted of possession for sale of a controlled substance. (§ 11378.) The court imposed the mandatory three-year enhancement at the time of sentencing. (§ 11370.2, subd. (c).) Kurbssoian claimed a 2018 amendment to section 11370.2 (Sen.

[1] Unless otherwise specified, all statutory references are to the Health and Safety Code.

Bill No. 180 (2017-2018 Reg. Sess.)) was retroactive and required the court to modify his sentence. (Stats. 2017, ch. 667, § 1 (SB 180).) We conclude, among other things, that: (1) the 2018 amendment to section 11370.2 did not apply retroactively to Kurbssoian's 2015 judgment, which was then final, and (2) the trial court did not abuse its discretion when it denied his motion to terminate his mandatory supervision. We affirm.

FACTUAL AND PROCEDURAL HISTORY

In 2015, Kurbssoian pled guilty to possession for sale of a controlled substance (§ 11378). He also admitted special allegations that he had three prior convictions of section 11351 which qualified for three-year consecutive sentence enhancements under section 11370.2, subdivision (c), and one prior conviction qualifying for a Penal Code section 667.5, subdivision (b) enhancement.

At sentencing, the trial court struck two of the section 11370.2 enhancements, and the Penal Code section 667.5, subdivision (b) enhancement. It sentenced Kurbssoian to 16 months and imposed a consecutive three-year enhancement under section 11370.2. It ordered Kurbssoian to serve two years in county jail and two years four months "to be served on Mandatory Supervision." Kurbssoian did not appeal.

In 2016, Kurbssoian admitted that he violated his mandatory supervision conditions. The trial court said, "his mandatory supervision is revoked, reinstated and modified." "The court will impose 120 days on the violation." It then said it "will authorize his release from custody and modify his terms and conditions of mandatory supervision" with the condition that he attend a "residential treatment program for a period of one year." The court ruled, "when he's released on December 21, he will

have 540 days remaining on mandatory supervision." Kurbssoian did not appeal.

In 2017, Kurbssoian admitted that he violated his mandatory supervision conditions. The court "modified" his "sentence." It ordered him to serve 180 days in county jail and 448 days on mandatory supervision. Kurbssoian did not appeal.

On February 13, 2018, Kurbssoina filed a "Motion to strike prior enhancement pursuant to statutory amendment of Health & Safety Code § 11370.2." He claimed a recently enacted amendment to section 11370.2 (SB 180) applied retroactively and invalidated the three-year enhancement the court had previously imposed. The trial court disagreed and denied the motion. Kurbssoian appealed.

DISCUSSION

Retroactivity of the 2018 Amendment to Section 11370.2

In his motion to strike his prior sentence enhancement under section 11370.2, Kurbssoian claimed that "SB 180's penalty-reducing amendments to section 11370.2" applied retroactively to his "case" and therefore the enhancement previously imposed "no longer applies." He argued his current sentence was consequently unauthorized and had to be corrected. He is wrong.

At the time of his 2015 conviction and sentencing, section 11370.2 required courts to impose a consecutive three-year term for each qualifying prior Health and Safety Code felony conviction listed in that section. The 2018 amendment to section 11370.2 (Stats. 2017, ch. 677, § 1) eliminated from that list the conviction under section 11351 that subjected Kurbssoian to the three-year enhancement under section 11370.2, subdivision (c). "Senate Bill No. 180 (2017-2018 Reg. Sess.), effective January 1,

2018, removes a number of prior convictions from the list of prior convictions that qualify a defendant for the imposition of an enhancement under section 11370.2, subdivision (c)." (*People v. Millan* (2018) 20 Cal.App.5th 450, 454 (*Millan*).)

Kurbssoian concedes that he "did not appeal his original sentence" and "his case became final 60 days from the sentencing and before the passage of SB 180." (*People v. Grzymski* (2018) 28 Cal.App.5th 799, 802.) Where a new sentencing law reduces the sentence for a crime the new law applies retroactively to *pending cases*, but not to final judgments. (*In re Estrada* (1965) 63 Cal.2d 740, 744.) "If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then . . . it, and not the old statute . . . applies." (*Ibid*.)

The People and Kurbssoian now agree that he "was not entitled to a reduction of his sentence based on *Estrada*." (*Millan*, *supra*, 20 Cal.App.5th at pp. 455-456 [the 2018 amendment to section 11370. 2 applies only to cases that are "not yet final"].) The trial court was not required to grant his motion based on the 2018 amendment.

Discretion to Terminate His Mandatory Supervision

Kurbssoian and the People agree the trial court had discretion to terminate Kurbssoian's mandatory supervision. They are correct.

Penal Code section 1170, subdivision (h)(5)(B) provides that mandatory supervision "may not be earlier terminated *except by court order*. Any proceeding to *revoke or modify mandatory supervision* under this subparagraph shall be conducted pursuant to either subdivisions (a) and (b) of [s]ection 1203.2 or [s]ection 1203.3." (Italics added.) Penal Code section

1203.2, subdivision (b)(1) permits a trial court to modify or terminate mandatory supervision, and provides, "[u]pon *its own motion or upon the petition of the supervised person* . . . the court may modify, revoke, or terminate supervision of the person." (Italics added.) Penal Code section 1203.3, subdivision (a) provides, "[t]he court shall . . . have the *authority at any time during the term of mandatory supervision* . . . to revoke, modify, or change the conditions of the court's order." (Italics added.) Consequently, the relevant statutory provisions authorize the court to exercise its discretion to modify or terminate mandatory supervision. (*People v. Camp* (2015) 233 Cal.App.4th 461, 470; see also *People v. Catalan* (2014) 228 Cal.App.4th 173, 179 (*Catalan*).)

Did the Court Properly Exercise Its Discretion?

Kurbssoian contends the trial court erred because "it concluded" that "it had no discretion to terminate mandatory supervision." We disagree because the record demonstrates that the trial court declined to modify Kurbssoian's mandatory supervision because it concluded the sentence previously imposed was appropriate.

We start with the presumptions that a "trial court is presumed to know the governing law" (*People v. Braxton* (2004) 34 Cal.4th 798, 814), and that it "properly exercised its discretion in sentencing" (*People v. Weddington* (2016) 246 Cal.App.4th 468, 492). An appellant has the burden to show otherwise. Kurbssoian has not met that burden.

Kurbssoian relies on some of the court's statements at the hearing. But if the order the court made was proper, the judge's comments "may never be used to impeach" an otherwise valid order. (*Burbank-Glendale-Pasadena Airport Authority v.*

Hensler (1991) 233 Cal.App.3d 577, 591; see also *In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 646.)

Here, defense counsel argued, among other things, that "there's a principle that the Court should not sanction [an] unauthorized sentence." "As of January 1st, the enhancement that [Kurbssoian] has been sentenced to is no longer authorized." He said, "this Court should follow the law as in SB 180." "I think the *Estrada* principle applies."

But the court responded that Kurbssoian's sentence was final before the new statutory change. It said, "I don't see anything in the statute that makes this retroactive." It said, "The Court denies this motion. I find that this judgment was also final. And I'm asking for more guidance and clarification from the Court of Appeals as to how far back we go on these sentencings and whether it sits on the principles of [*People v. Mendoza* (2016) 5 Cal.App.5th 535], whether it's requested and remanded to the Court for resentencing. *If the Court has the authority under Mendoza to impose the sentence*, that sentencing officer deems appropriate with the charges and triads and enhancements available. *In this particular case*, as I said, the low term of 16 months, [section] 11378. Apparently, there's also a [Penal Code section] 667.5(b) prior also struck in this case. In light of the conclusions of the sentencing judge, *four years four months is appropriate*. [¶] So denied *on both those grounds* subject to further education of me by our District Court of Appeals. *Denied on both*." (Italics added.)

The court's reference to *Mendoza*, was in response to the argument of Kurbssoian's counsel on the scope of resentencing. In *Mendoza*, we held, "When a trial court grants Proposition 47 relief on an eligible felony offense, it resentences

the defendant to a misdemeanor." (*People v. Mendoza* (2016) 5 Cal.App.5th 535, 538.) "Proposition 47 does not limit the court to rigid sentencing options." (*Ibid.*) "A trial court may reconsider any component underlying the sentence." (*Ibid.*)

But the discussion by counsel and the court about the scope of resentencing was largely academic because Kurbssoian failed to show any valid grounds to modify his sentence. Moreover, the trial court indicated that even if *Mendoza* applied to allow complete resentencing in Kurbssoian's favor, the court would not grant that relief because it found the sentence of "four years four months *is appropriate*." (Italics added.)

This was a ruling on the merits about what sentence is proper. Here, the trial court clearly indicated that it would not exercise its discretion to impose a different sentence because the prior sentence was appropriate. Where the court declines to terminate mandatory supervision "the defendant bears the burden" to show error. (*Catalan*, *supra*, 228 Cal.App.4th at p. 179.) Kurbssoian has not done so.

Kurbssoian claims the court should have granted his motion, but he made no showing to provide the court with grounds to justify a reduction or change in his sentence. He did not present testimony or a current probation report. His motion did not contain a declaration or other evidence to show good cause or changed circumstances involving his behavior. Counsel made no offer of proof on that issue. And Kurbssoian's prior performance on mandatory supervision and his criminal history were not favorable factors for a sentence modification.

In short, no showing was made that Kurbssoian had been rehabilitated or that mandatory supervision was no longer necessary. Given the absence of any *factual* showing in favor of a

sentence modification the court was justified to exercise its discretion by denying his motion without making any sentencing change.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Bruce A. Young, Judge

Superior Court County of Ventura

Todd W. Howeth, Public Defender, William M. Quest, Deputy Public Defender, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle, Margaret E. Maxwell and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.